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China Employment Law Update - June 2016

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Abstract

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Comments

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New Regulations on Vocational School Interns

On April 11, 2016, the Ministry of Education, Ministry of Human Resources and Social Security and three other ministries jointly issued the *Regulations on the Internship of Vocational School Students* ("**2016 Regulations**"), which took immediate effect.

The 2016 Regulations supersede the previous 2007 regulations on the same subject, and expand the scope of application from "secondary vocational school students" to cover "secondary and higher-level vocational school students".

According to the 2016 Regulations, there are three types of vocational internships: "observing internships" (where the intern learns through observing the work), "guided internships" (where the intern performs work under close supervision), and "independent internships" (where the intern performs the work independently with minimal or no supervision). Most of the updated restrictions only apply to the third type, i.e. independent internships, since such types of internships are the ones most often subject to abuse by companies. In theory, the key purpose of vocational internships is to provide education and training to vocational students, but in practice, some companies use vocational interns as a flexible and cheap source of labor.

The new requirements applicable to independent internships include the following:

- **Percentage:** a restriction that such interns cannot exceed 10% of the employer's total workforce and the number of independent interns in a specific role must not exceed 20% of the number of employees in a similar position.
- **Term:** the period of the independent internship should generally last for no longer than six months.
- **Salary:** pay for independent interns must be no less than 80% of the probationary period salary for regular employees in the same position.
- **Overtime:** independent interns may not work any overtime or night shifts.
- **Guardian consent:** guardian consent is required to hire any independent intern below the age of 18.

In addition, companies and vocational schools should purchase liability insurance to cover potential accidents/injuries of vocational interns. The 2016 Regulations state that the company and school may determine

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by contract who would be responsible for any costs not covered by the insurance.

Key Take-Away Points:

The 2016 Regulations take a more restrictive attitude towards use of vocational school interns by employers. Although the 2016 Regulations are still generally silent on the sanctions, employers that use vocational school interns should be aware of the new requirements and comply with these when recruiting interns from vocational schools.

Amended Measures Require Companies To Reassess Contingency Plans for Work Safety Incidents

On April 15, 2016, the State Administration of Work Safety amended the *Measures for the Administration of Contingency Plans for Work Safety Incidents*. The amendments provide further guidance on creating, publicizing, distributing and administering contingency plans for work safety incidents and also increase the sanctions for non-compliance. The amended measures will take effect on July 1, 2016.

The current measures only provide general guidance for a company on how to create, publicize and administer its contingency plan. The amended measures provide more detailed guidance. In addition to the current requirements related to drafting, review, publication and filing, under the amended measures, companies will also need to:

- form a contingency plan drafting group who are experienced in onsite contingency management to assess risks and investigate available resources;
- publicize and distribute the contingency plan to relevant departments, personnel and rescue teams and further distribute it to workers on contingency plan cards that provide key information to help rescue teams respond promptly and efficiently to work safety incidents;
- inform other companies and people nearby who could be affected by work safety incidents and the planned response to those incidents; and
- assess the contingency plan on a "regular basis" to determine whether revisions to the plan are necessary (instead of automatically revising the plan once every three years as currently required).

The amended measures increase fines and extend liability from the company to responsible persons, and lower the threshold for violations. While the range of fines for most non-compliant activities remains RMB10,000 to RMB30,000, the fine for failure to draft a contingency plan or to organize emergency drills will increase to RMB100,000 for the company. Also, the person responsible for these failures can now be fined up to RMB20,000.

Key Take-Away Points:

Every company should be aware of the new requirements under the amended measures to avoid being liable for increased non-compliance penalties. The amended measures reflect the importance that the government is giving to work safety issues and the increase in fines and personal liability for responsible persons, further underlines this.

First “Right to be Forgotten” Case Denied by Beijing Court

The Haidian District Court of Beijing recently denied an employees’ request to remove the link between his name and that of his previous employer, which has a notorious reputation for being involved in fraud. This is the first case in China to deal with the “right to be forgotten”.

The employee worked for an educational institution in Wuxi (“**Wuxi Company**”) from July 2014 to November 2014. In April 2015, the employee undertook a search on a website of an internet company which provides internet search services to the public (“**Internet Company**”), and found that by entering his name as a search term, the results included many references to the Wuxi Company, and by entering the Wuxi Company’s name, information about the fraud would be listed.

The employee later sued the Internet Company and requested that it delete the link to some damaging key words, apologize to the employee and compensate his loss. The employee asserted that the Wuxi Company had a negative reputation within the education industry and that he had not actually worked for that company. The employee alleged that the Internet Company had violated his right of reputation, right to his name and his right to be forgotten, which should be a part of his general personality rights, by linking his name to the Wuxi Company.

However, the court ruled that there was no intention on the part of the Internet Company to humiliate or disparage the employee. The search results were automatically produced by the search engine based on algorithmic technology. Therefore the Internet Company did not violate the employee’s right to his name. The court further held that the information that the employee had requested to be deleted was directly related to him and the right he asserted is not a part of the scope of personality rights provided in China’s Civil Code. In conclusion, the court rejected all of the employee’s claims.

In a separate privacy-related case in Guangzhou, a local court ruled that the employer had violated employees’ privacy rights by arranging for them to have a hepatitis B examination and then publishing the examination results.

Key Take-Away Points:

Generally speaking, awareness of privacy concerns is on the increase in China particularly among employees. It seems that courts in China are increasingly more willing to rule on cases involving privacy breaches.

Employers should ensure they follow the relevant data privacy legislation when dealing with employees’ personal information particularly in light of the fact that employees are prepared to protect their rights through the judicial process.

Chinese Media Hails First Successful Claim by Employee Against AIDS Discrimination

In April 2016, a court in Guizhou province was asked to consider whether an employee had been discriminated against on the grounds of AIDS or HIV positive status. The employee's employment contract was not renewed as he had allegedly failed to pass his employer's medical check. The employee later found out that the real reason for the non-renewal was due to his HIV positive status. As a result, he filed a lawsuit requesting reinstatement of employment and compensation for emotional distress.

The trial court initially refused to take the case filed by the employee, but the appellate court ruled that this decision was incorrect and thus ordered the trial court to hear the case. The trial court ruled that the employer must pay severance to the employee for the non-renewal of the employment contract, but dismissed the employee's request for renewal and reinstatement to the job, and also did not award damages for emotional distress sought by the employee.

Despite the headlines in the media, the court in this case did not specifically find discrimination on the grounds of AIDS or HIV-positive status, nor did it order a payment of damages on the basis of discrimination. However, some scholars have taken the view that the court must have considered the AIDS discrimination element in its ruling, and have thus affirmed this as the first AIDS discrimination case won by an employee.

Key Take-Away Points:

It has been difficult for employees to win employment discrimination claims as China does not have the same well-developed anti-discrimination laws as in some western countries, and in practice it is hard for employees to gather and provide sufficient evidence showing the existence of discrimination. However, public awareness is increasing in relation to employment discrimination issues, especially discrimination against the most vulnerable groups of people such as those who are HIV positive or carry the Hepatitis B virus, and therefore courts are more open to hearing these types of cases and finding in favour of such claimants, as illustrated by this case.

Beijing Intermediate Court Provides Views on Various Labor Dispute Issues

On April 27, 2016, the Beijing No. 3 Intermediate People's Court ("**Court**") held a press conference regarding its annual review of labor disputes heard by the Court in 2015 and 2016, and addressed a wide range of labor issues.

The presiding judges commented that the number of labor disputes continues to grow over the years, and there has been a notable increase in the number of collective employee actions, claims brought by younger employees (between the ages of 25 to 35), and more high value disputes involving senior managers and senior technicians.

The Court clarified its position on a number of labor issues including the following:

- Key terms required to constitute an employment contract: Offer letters that do not contain key terms, such as labor remuneration, contract term, social insurance, labor protections and conditions, would not be treated as an employment contract, and the employee would be entitled to claim damages (such as double salary) for the company's failure to sign a written employment contract. Conversely, an offer letter or other signed covenants that contain the said key terms would be treated as an employment contract.
- Severance claims based on unpaid overtime: The Court would likely take different views on severance claims brought by employees who resign alleging unpaid overtime compensation, depending on the severity of the situation. If the employer has not paid any overtime compensation for an extended period of time, the Court would likely support the employee's severance claim in a resignation. If, however, the company has paid reasonable overtime compensation, even though such amount is subsequently ruled to be inadequate by the Court, the employee cannot claim severance payment for his/her resignation.
- Treatment of annual leave during suspension of operations: Employees may not be able to claim annual leave compensation if they are required to take leave due to the company's suspension of operations, provided that such suspension is legitimate, and the company pays salary or living allowances during the suspension. Many cities' local regulations require companies that suspend their operations and put the employees on leave to pay the employees full salary during the first month of suspension, and reduced wages afterwards.
- Incompetence criteria: Under the company's performance ranking system, the employee who receives the lowest ranking among all employees does not necessarily satisfy the "incompetence" criterion under Article 40(2) of the Employment Contract Law, based on which the employer can unilaterally terminate the employee. Therefore, the Court would likely ask the employer to prove additional factors to demonstrate how the employee is "incompetent" in support of its termination decision.
- Employment cessation certificate: An employee can claim damages against the employer for failure to issue the employee with an employment cessation certificate on a timely basis for government registration purposes. The employee must prove that such a failure has resulted in a financial loss, such as preventing him/her from being able to enrol in new employment or to receive unemployment benefits.
- Non-competition payment for retirees: An employee whose employment contract expires due to his/her reaching the statutory retirement age can still claim non-competition compensation provided in the original employment contract, if he/she complies with such obligations.

Key Take-Away Points:

Courts in China are becoming more sophisticated in handling labor cases and tend to review a number of factors when providing a ruling in each case. Companies should be aware that courts in different cities may hold

different views on the same issues, and therefore they should be familiar with the courts' views / attitudes on key employment matters in cities where they operate.

Employer Ordered to Pay Further Sums After Entering Into Settlement Agreement

In a recent case, a company in Beijing was reportedly ordered to make an additional payment in the amount of RMB 15,000 after the company had signed an employment contract non-renewal agreement and had paid severance, year-end bonus and other payments totalling RMB 50,000 to an employee.

The employment contract non-renewal agreement specified the severance amount and year-end bonus amount; however, it did not itemize a payment of RMB 18,000 as any particular payment but simply labelled it as "other payments". The employee later claimed for additional payments for unused annual leave compensation, underpaid salary and a safety bonus. The company argued in court that those payments had all been covered by the "other payment" amounts while the employee asserted that the payment was just a good-will payment. The court ruled in favor of the employee and ordered the company to pay the unused annual leave compensation, underpaid salary and safety bonus.

Key Take-Away Points:

There is a risk that employees may still claim additional payments if a settlement agreement is not well drafted and the settlement payments are not well defined. To mitigate the risk, companies are recommended to clearly define and itemize each payment under the termination agreement and include a comprehensive and specifically-worded waiver and release from the employee.

Court Rejects Employee's Challenge to Legality of Company Policies

In May 2016, the Jimei District Court in Xiamen dismissed an employee's challenge to the legality of the company's policy adoption procedure, and as a result rejected the claims for unpaid overtime payment and commissions.

In June 2012, the company convened an all-employee meeting to adopt its policies and the participants signed the meeting minutes. The company then lost the original meeting minutes, so it arranged for the employees to re-sign the newly-prepared minutes. The employee who brought the claims also separately signed an acknowledgment of receipt of the policies on an annual basis from 2012 to 2014. In addition, his employment contract provided that he should abide by the company's rules and policies, and that such rules should be attached to the employment contract as annexes (according to the court, the rules were in fact attached to the contract).

The employee resigned and signed a termination contract under which he agreed to waive all claims against the company, but then brought payment claims before the labor tribunal and court. He argued that he was not aware of the company policies (e.g., the overtime application

procedure and the commission policy), and therefore, he should be entitled to additional overtime payment and commissions. The company, on the other hand, argued that the employee would not be entitled to any overtime pay or commissions, as its policy made it clear that employees should obtain an approval to work overtime, and this employee did not submit any overtime application. In addition, the policy also stated that employees who left the company are not eligible to receive any outstanding commissions.

The court ruled that the company policies were properly adopted and should be binding on the employee. The employee had signed an acknowledgment of receipt of the policies and re-signed the meeting minutes to confirm the content of the policies. In addition, there was evidence to demonstrate that the employee had actually followed the overtime payment policy and the commission policy during his employment, and therefore he was both aware of and bound by the company policies. Furthermore, the employee had waived all claims against the company in the termination document. On this basis the court dismissed the employee's claims.

Key Take-Away Points:

Companies should follow the statutory employee consultation procedure to adopt their rules and policies, and should ensure that the whole process has been fully documented. In addition, to avoid future disputes, the company should carefully retain all documentation related to the adoption procedure. It is also recommended that employees confirm receipt of the company policies in the employment contract, as such provisions can be used as direct evidence to prove the employee's acknowledgement of the policies.

Court Rules Against Employer on Termination for Serious Violation of Company Rules

The Shanghai No. 1 Intermediate People's court reportedly ruled that a company had wrongfully terminated an employee's contract on the grounds of a serious violation of company policies.. The court took the view that the employee's misconduct did not constitute a sufficiently "serious" violation of the company's policies.

The misconduct related to an employee uploading three photos of a colleague in addition to posting five obscene pictures with inappropriate language on a social media website called 'WeChat Moments' . The posts were viewed by the president, colleagues and clients of the company. The company summarily terminated the employee for a serious violation of company rules as her actions had an adverse effect on the company's reputation. The employee sued the company for unlawful termination and alleged that her posts did not impact on the company's reputation as they were published after working hours (at 8 pm).

The company handbook very generally provided that the company could terminate an employee in circumstances where the employee had seriously disrupted work, caused damage to the business and to the company's reputation. However, the court did not agree that the misconduct in this case was a sufficiently "serious" violation of the company's rules and found in favor of the employee as the court held that

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the company did not submit evidence to prove the extent of damage to the company's reputation.

Key Take-Away Points:

This case demonstrates that the courts in China do not treat damage to reputation as seriously as actual financial loss. It is therefore advisable for companies to define what specific actions may lead to summary dismissal in the company rules to increase the chances that a court will rule in the company's favor and ensure that they are protected from such instances where employees post damaging material on social media sites.

Employee Termination for Misuse of Sick Leave Upheld by Court

In a recent Jiangsu Province case, a court held that a company had lawfully terminated an employee for misusing her sick leave.

The employee joined the company in 2006 and was later promoted to the position of Workshop Quality Manager. There were a number of client complaints about quality issues and the employer sought to transfer the employee but an agreement could not be reached on a proposed reduction in salary and annual leave. The employee made a request for a three month period of sick leave which was supported by a hospital certificate. The company paid the employee three months' sick leave in her capacity of manager, but became aware that the alleged illness did not require such a long period of sick leave, and that the employee had been to Malaysia for one week during the sick leave period.

The company issued a notice of termination to the employee on the basis of her failure to agree to the new work arrangement and her misconduct. The employee challenged the termination and made a claim for severance. The court held that it was both fair and procedurally lawful for the company to terminate the employee based on the company's regulations and relevant laws, and dismissed the employee's claim for severance compensation.

Key Take-Away Points:

This case underlines the importance of having a comprehensively drafted set of examples of misconduct in the company handbook or relevant standalone policy and for the handbook or policy to be lawfully adopted through the legally required employee consultation procedure. This will increase the likelihood of the termination being held lawful.

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